

Peterson v. Tollefson Response of Tollefson's January 28, 2022 Response

Intro:

Please accept this as my response to Ms. Tollefson's reply in EL 22-05 Petersen v. Tollefson.

Regarding "Complaint Item 1 (Exhibit 3, page 1)"

In Ms. Tollefson's response, she states "Complainant does not dispute the actual validity of any signature at issue in "Item 1", nor does Complainant dispute the validity of the actual date ultimately signed by Potter upon submission of his nomination papers." To be clear, I do dispute both. I dispute the validity of all 27 signatures on pages 1, 3, and 4 because the certification of circulator section of these pages is not in compliance with the requirements set by Wisconsin State Statutes. If the certification is not valid, all the signatures on the page are also not valid. Also, I dispute the validity of the actual date because the date is not legible and/or it is ambiguous and there is no written record to supplement Mr. Potter's nomination papers showing what the certification date should ultimately be.

In Ms. Tollefson's response, she indicates that Complainant argues that Wis. Admin. Code § EL 2.05(2) means that when the filing officer obtains physical possession of nomination papers, the submitter may no longer alter such papers in any manner. This is not my argument. My reference to Wis. Admin. Code § EL 2.05(2) is only to help establish that Mr. Potter's nomination papers were deemed "filed" when he turned them into the Rock County Clerk's office and the Clerk first accepted physical possession of those nomination papers. Mr. Potter has every right to correct his nomination papers both before filing and after filing them, as long as it is done no later than 3 days after the filing deadline and as long as the corrections are made in compliance with both state statutes and administrative code – which they were not.

There is a dispute as to whether or not Mr. Potter altered his nomination papers before or after they were filed with County Clerk Lisa Tollefson. It is my position that Mr. Potter altered his nomination papers after they were filed whereas Ms. Tollefson alleges Mr. Potter altered his nomination papers before they were filed.

Ms. Tollefson alleges that Mr. Potter altered his nomination papers prior to them being filed because she did not consider them filed at the time they were altered. Ms. Tollefson's response indicates that the Rock County Clerk Office has a practice in place of considering papers filed only after the office and the candidate agree on the number of pages and the estimated number of signatures being submitted. After her office and the candidate come to an agreement, her office completes a Nomination Paper Chain of Custody form and nomination papers are date-stamped and accepted for filing.

Ms. Tollefson indicated that after she handed Mr. Potter's nomination papers back to him for the purpose of making corrections, that Mr. Potter would have been free to take the papers with him and leave without filing them. Ms. Tollefson does not cite any statute or administrative code that allows her to return nomination papers to an individual after the submission of the papers to the clerk's office. Returning nomination papers to the submitting individuals for the purpose of

making corrections without an affidavit sets a dangerous precedent because the individual working in the clerk's office may not know if the submitter is the candidate, the circulator, or somebody else simply delivering papers.

On Page 3 of Ms. Tollefson's response, she states "There was no need for him to file along with those papers an affidavit of correction because the papers had not yet been filed." At the point where Mr. Potter handed his nomination papers to Ms. Tollefson, he could have turned around and walked out of the room and his papers would have been filed. Therefore, I believe any changes made after the point where Mr. Potter handed his nomination papers to Ms. Tollefson would have been considered post-filing.

Ms. Tollefson failed to cite any relevant state statute or administrative code that mandates her office to agree with the candidate on the number of pages and estimated signatures being submitted prior to deeming the nomination papers filed. In Ms. Tollefson's response, she admits that nomination papers can be submitted by mail and be deemed filed as long as the papers are received by the statutory deadline. Ms. Tollefson has not indicated how this process would be followed if the candidate submits their papers by mail or if a non-candidate individual drops off the nomination papers on behalf of the candidate. Therefore, I conclude that this process is not required for her office to deem papers filed because it cannot be applied consistently in a variety of different scenarios where the candidate is not personally hand delivering nomination papers and also physically waiting in the Rock County Clerk's office until that office has had sufficient time to review the nomination papers.

Per Wis. Admin. Code § EL 2.05(2), "In order to be timely filed, all nomination papers shall be in the physical possession of the filing officer by the statutory deadline." Wis. Admin. Code § EL 2.05(2) is the most relevant administrative code or state statute that discusses the filing of papers and it mentions "physical possession" is what determines if nomination papers are timely filed. If the deadline to file is 5:00 PM on January 4, 2022, and Mr. Potter physically hands his papers to an individual in the Rock County Clerk's office on that day at 4:59 PM but the Clerk's office is not able to review the documents and agree with Mr. Potter on the number of pages and the estimated number of signatures being submitted until 5:05 PM, I believe Wis. Admin. Code § EL 2.05(2) would deem Mr. Potter's nomination papers filed at 4:59 PM and not 5:05 PM. Therefore, the first moment the clerk's office takes physical possession of any candidate's nomination papers, those papers should be deemed filed and they should not be returned to the individual dropping those papers off, regardless if that individual is the candidate or somebody else dropping papers off for the candidate. This also means that Mr. Potter altered his nomination papers after they were filed, not before.

Wis. Admin. Code § EL 2.05(4) does not speak to whether or not an affidavit is required before filing or only after filing nomination papers. Mr. Potter's obvious intent as shown in Exhibit 9 was to file his nomination papers with the Rock County Clerk. At the point Ms. Tollefson accepted the papers from Mr. Potter, Mr. Potter could have left the office and his papers would have been considered filed. However, after receiving Mr. Potter's papers, the Clerk took time to review each page and returned the incorrectly dated pages to Mr. Potter to make changes — without an affidavit. At no time was the entire packet of nomination papers returned by Ms.

Tollefson to Mr. Potter, so when Mr. Potter handed his nomination papers to Ms. Tollefson, that was the filing of those papers.

Based on the language of the Wisconsin Elections Commission Nomination Paper Challenges January 2018 handbook (Exhibit C) in section 2(b) and based on the language of Wis. Admin. Code § EL 2.05(4), it is my interpretation that a candidate is not mandated to correct errors, but if he elects to correct errors, then those errors must be corrected with an affidavit. These errors can be corrected both before and after the filing deadline (up to 3 days later) which means whether or not Mr. Potter's nomination papers were deemed filed at the time he made corrections has no bearing on whether or not his corrections needed to be made by affidavit.

Based on her response, I believe Ms. Tollefson's interpretation of "errors...may be corrected by an affidavit" in Wis. Admin. Code § EL 2.05(4) is that errors can be corrected by affidavit or they can be corrected some other way. In other words, she is arguing that the use of an affidavit to correct errors is optional. The basis for her interpretation is that requiring candidates to follow this rule as written would create absurd results because all minor errors would need an affidavit, and requiring an affidavit for minor errors would result in an artificial barrier to ballot access. I believe Ms. Tollefson's interpretation of Wis. Admin. Code § EL 2.05(4) is incorrect and applying the clear and plain language of this administrative code would not lead to absurd results or an artificial barrier to ballot access.

"Errors...may be corrected by an affidavit" in Wis. Admin. Code § EL 2.05(4) means that correcting errors is optional, but if the candidate elects to correct errors, an affidavit to do so is mandatory. It is the correction of the errors that is optional, not the method of using an affidavit itself. To support this interpretation, it is important to note that Wis. Admin. Code § EL 2.05(4) names no other approved method other than an affidavit to correct errors on a nomination paper. Additionally, the Wisconsin Elections Commission Nomination Paper Challenges January 2018 handbook (Exhibit C) in section 2(b) says the challenge must be approved and the signatures on those pages struck if the circulator has not corrected these errors by affidavit. Furthermore, Ms. Tollefson cites no other state statute or administrative code that permits errors on nomination papers to be corrected without an affidavit.

Ms. Tollefson claims that mandating an affidavit to correct minor errors results in absurd results, but it is not my position that minor errors need to be corrected with an affidavit. Only critical/major errors need an affidavit because minor errors could be left uncorrected and the nomination papers can still be accepted with uncorrected minor errors. The Wisconsin Elections Commission Nomination Paper Challenges January 2018 handbook (Exhibit C) gives several examples of minor errors that would not invalidate the signatures on a candidate's nomination papers if left uncorrected. Some examples include:

*The candidate has not specified a municipality for voting purposes.

*The candidate has not completed the gender identification checkbox in the candidate certification statement.

*The elector's address is missing the municipality designation or the elector has checked a box in error.

Having a date of certification that is incomplete or incorrect is not a minor error. If the candidate wants the signatures on a page with incomplete or incorrect certification to be deemed valid, the error must be corrected through the use of an affidavit.

In the January 20, 2022 decision issued by the Wisconsin Election Commission (WEC) regarding Abraham Voelker v. DeeAnn Cook (Case No.: EL 22-03), the WEC determined that the Complainant did not show probable cause to believe that a violation of law or abuse of discretion occurred with relation to Wis. Stats. §§ 8.10 and 8.15, and Wis. Admin. Code § EL 2.05. Complainant's ballot access challenges relied on arguments that his Opponent violated Wis. Stats. §§ 8.10 and 8.15, and Wis. Admin. Code § EL 2.05, when Opponent filed nomination papers with the Respondent that lacked a circulator signature. The Respondent clerk then allowed Opponent to return and sign the filed papers, rather than requiring a corrective affidavit to rectify the deficiency.

I believe the circumstances in Petersen v. Tollefson compared to Voelker v. Cook are significantly different. Specifically: In Voelker v. Cook, the nomination papers were filed with the circulator signature incomplete; it was not filed as incorrect. Wis. Admin. Code § EL 2.05(4) requires an affidavit to make corrections, not necessarily to complete incomplete information. In Petersen v. Tollefson, the circulator date was not incomplete, but rather it was incorrect as admitted by Ms. Tollefson in her response to the original challenge (Exhibit 3). Ms. Tollefson stated that "Robert corrected the dates," not that "Robert completed the incomplete dates."

Wis. Admin. Code § EL 2.05(5) does state that "Where any required item of information on a nomination paper is incomplete, the filing officer shall accept the information as complete if there has been substantial compliance with the law." An important distinction between Voelker v. Cook and Petersen v. Tollefson is that the required information on Jerry McRoberts' nomination papers was incomplete and after completed, there was no dispute as to what that information was or should be. This sharply contrasts with the Petersen v. Tollefson complaint where the required information on Robert Potter's nomination papers was not incomplete, but rather incorrect. While Wis. Admin. Code § EL 2.05(4) does state that "Any information which appears on a nomination paper is entitled to a presumption of validity," based on both Mr. Potter's response to the original challenge and Ms. Tollefson's decision on the original challenge and response to the WEC complaint, it is not disputed that the information on the nomination paper (the circulator dates) was not correct. Therefore, there no longer is any presumption of validity, as that presumption was waived when both the candidate and the clerk admitted the circulator dates were in error.

In Petersen v. Tollefson, because an affidavit was not used to make corrections, there is no documented record of what the correct date was in the circulator section after "Robert corrected the dates." The reason for this is because the circulator date is not legible or is ambiguous. Had an affidavit been used as required by Wis. Admin. Code § EL 2.05(4), there would have been a documented record of both the original circulator date and the corrected date with no concerns regarding ambiguity or dates not being legible. The WEC decision in Voelker v. Cook states "The use of a corrective affidavit is primarily utilized to prevent alteration and ambiguity after

the submission of nomination papers.” In Voelker v. Cook, there was no alteration, and there was no ambiguity. In Petersen v. Tollefson, there is both alteration and ambiguity. Therefore, the WEC found Voelker v. Cook to be in substantial compliance, but I do not believe Mr. Potter’s nomination papers are in substantial compliance.

In reviewing Mr. Potter’s nomination papers, Mr. Potter’s response to the original challenge, Ms. Tollefson’s determination in the original challenge, and Ms. Tollefson’s response to the WEC complaint of Petersen v. Tollefson, it is important to note that there is zero record whatsoever of what the corrected circulator date was supposed to be on pages 1, 3, and 4 of Mr. Potter’s nomination papers. Ms. Tollefson did say in her response to the WEC complaint that “I was able to read them and so did not deem them illegible,” but she never said what the dates are supposed to be. An affidavit would have served the purpose of providing a clear and unambiguous public record.

Regarding “Complaint Item 4”

In the original challenge to Mr. Potter’s nomination signatures, Mr. Potter did respond with affidavits for several of the challenged signatures, and this complaint to the WEC does not dispute any of the signatures which Mr. Potter provided an affidavit to support. However, Mr. Potter could not offer a single affidavit for these three challenged signatures located in the Hawk’s Ridge Apartment Complex:

Signature page 2 line 7 - Josh Fillmore (does not reside at 1730 Gateway Blvd Apt 24)
Signature page 3 line 6 - Sara Munz (does not reside at 1752 Gateway Blvd)
Signature page 3 line 7 - Betty Hawk (does not live at 1736 Gateway Blvd)

I do not believe Mr. Potter met his burden to prove that these three individuals exist as real electors that live at the listed addresses. I also believe Ms. Tollefson would agree Mr. Potter did not meet his burden, but Ms. Tollefson validated these signatures anyway on the basis that she thought the challenger failed to meet the challenger’s burden of proof and that according to Wis. Admin. Code § EL 2.05(4) “Any information which appears on a nomination paper is entitled to a presumption of validity.” In other words, Ms. Tollefson validated the signatures because she believes Mr. Potter had no burden to meet because the challenger failed to meet his burden and therefore no burden was on Mr. Potter to prove anything. In this regard, I believe Ms. Tollefson was incorrect and abused her discretion in reaching the conclusion that the original challenger failed to meet the burden.

Ms. Tollefson believed the challenger failed to meet the burden based on:

- a. Ms. Tollefson’s concerns of the authenticity of Paige Jimenez ‘s email.
- b. Property Manager Jimenez’s email does not explain how Ms. Jimenez determined that these three individuals do not reside at the listed addresses.

I believe Ms. Tollefson abused her discretion in coming to these conclusions because she did not use a demonstrably rational process or reach a conclusion that a reasonable person would reach in this situation.

As part of this complaint to the WEC, Exhibits 5, 6, 7, and 8 were all offered in accordance with Wis. Statute §5.06(1) which says "the complaint may be accompanied by relevant supporting documents." These supporting documents help re-enforce the evidence that was originally offered to Ms. Tollefson by the original challenger, but Ms. Tollefson's response states "Complainant also now offers Exhibit 6 to his Complaint in order to authenticate the email that was submitted with the initial challenge. However, Complaint Exhibit 6 was not included in the initial challenge and as such could not have been part of my determination. It should not be considered as a part of this complaint."

While I understand Ms. Tollefson made a determination to the original challenge using evidence submitted at that time, she is arguing that her discretion should not be questioned on evidence she did not have at the time she made her determination. However, Ms. Tollefson's initial determination did exactly that - she came to conclusions where there was no evidence to support those conclusions.

a. Ms. Tollefson's concerns of the authenticity of Paige Jimenez's email.

Ms. Tollefson concluded the email may have been a fabrication because "the email was not accompanied by any other documentation that would have authenticated the sender" and "emails are notoriously easy to fake." Ms. Tollefson came to this conclusion despite zero evidence in the record that the email was fake. Therefore, because there was no evidence to support these conclusions, it was an abuse of her discretion to conclude the email was not authentic.

If Mr. Potter was concerned the email from Ms. Jimenez was inauthentic, he could have raised that issue and provided evidence to support that view, but he did not.

If Ms. Tollefson was concerned the email from Ms. Jimenez was inauthentic, she could have exercised the power given to her in Wis. Admin. Codes § EL 2.07(1) and EL 2.05(3) to consult extrinsic sources of evidence, but she did not. She argues she did not consult extrinsic sources of evidence due to a lack of time, but she had 3 full business days to investigate (January 10, 11, and 12). A reasonable person following a demonstrably rational process that had a legitimate concern over the authenticity of the email would have made at least some minimal attempt to authenticate it. Ms. Tollefson could have taken 5 minutes to email Ms. Jimenez, and Ms. Jimenez may or may not have responded timely, but we have no way of knowing because Ms. Tollefson made no such attempt. A reasonable person would have at least made some attempt, but Ms. Tollefson did not.

Additionally, there is no legal requirement for a challenger to include additional documentation to authenticate emails as evidence. Making up such a requirement leads to absurd results and creates an artificial barrier to challenges that does not exist in Wisconsin State Statutes or Administrative Code. I hope the irony is not lost on the WEC that Ms. Tollefson is arguing an affidavit is not required for changing circulator dates in "Complaint Item 1" when EL 2.05(4)

explicitly mentions using an affidavit, while at the same time she argues that the email from Ms. Jimenez should be accompanied by additional documentation like an affidavit when there is no legal requirement to do so. It appears that Ms. Tollefson's opinion on whether or not affidavits are required seems to change based on whatever is most favorable to Mr. Potter instead of what is mentioned in the relevant Wisconsin State Statutes or Administrative Code. This certainly has the appearance of a possible abuse of discretion. Despite this, I do believe the challenger did authenticate the email when it was submitted with the challenge, as the entire challenge itself, including all evidence, was notarized on January 7, 2022 by Notary Public Taylor Braun.

While I do believe Ms. Tollefson has some discretion to determine if an email submitted as evidence in a nomination paper challenge is authentic or inauthentic, it is only within her discretion if there is evidence introduced by Mr. Potter or by her office from the consultation of extrinsic sources that disputes the authenticity of the evidence. If there is no evidence submitted challenging the authenticity of the evidence, then it would be an abuse of Ms. Tollefson's discretion to make a determination on something where there was no evidence to support that conclusion.

I do believe a reasonable person would conclude the email was authentic for several reasons:

- *Regardless of who the recipient was, the message from Paige Jimenez would be the same. The email recipient is not material to the challenge and Ms. Tollefson failed to explain why or how it would be.

- *The email was mostly in Mr. Potter's favor and determined 5 of the 8 signatures in question were actual residents.

- *The email identified apartment numbers for all 5 of the confirmed residents despite Mr. Potter's papers lacking apartment numbers on 4 of these 5.

- *The email was able to correct the spelling of the signature on page 2, line 3 which was not legible as being resident Roylen Peraza.

- *The domain of the email was teronomy.com which is a business domain name and not an easily fabricated free email provider such as Gmail, Yahoo, or AOL. A quick visit to the website of <https://teronomy.com/> shows that Teronomy is a real estate management company for Hawks Ridge Apartments in Beloit, WI and provides a phone number Ms. Tollefson could have used to contact Paige Jimenez if she preferred to use the phone instead of an email address to verify any information she wanted to verify.

Perhaps most importantly, Ms. Tollefson's response to the WEC complaint said "I did not have any reason to specifically believe that the email was inauthentic." Per her own admission, not accepting the email as authentic is not supported by the evidence.

b. Property Manager Jimenez's email does not explain how Ms. Jimenez determined that these three individuals do not reside at the listed addresses.

Ms. Tollefson argues that Ms. Jimenez's email confirming the non-residency of the three signers at Hawk's Ridge Apartments in Beloit, WI was not convincing because Ms. Jimenez did not articulate how Ms. Jimenez determined the non-residency of the three signers being challenged, but there is no relevant Wis. State Statute or Administrative Code that requires this. This requirement leads to absurd results and creates an artificial barrier to challenge nomination papers that does not exist in Wisconsin State Statutes or Administrative Code.

Mr. Potter could have introduced evidence that Ms. Jimenez made a mistake or he could have introduced evidence that the three challenged signers really did exist and did reside at the addresses listed, but he failed to do either.

Mr. Potter said "When I knock on doors and people answer I ask if the[y] live at the residence." Although Mr. Potter said this, he was speaking in general terms, and he did not specify if he did this when he collected the three specific signatures being challenged at Hawks Ridge Apartments nor did he offer any evidence of him actually doing this. Furthermore, just because somebody claims they live at the residence does not mean they actually do. Either way, there is no evidence these three challenged signers actually reside at the address listed and all the evidence submitted actually shows they do not.

Ms. Tollefson could have exercised the power given to her in Wis. Admin. Codes § EL 2.07(1) and EL 2.05(3) to consult extrinsic sources of evidence by questioning the process Ms. Jimenez used to determine non-residency of the three signers, but she did not.

No evidence was ever provided that Ms. Jimenez did not have perfect knowledge of who is or is not residing in a particular unit at any given time. No evidence was ever provided that Ms. Jimenez was unaware that an apartment's lessee has allowed other individuals who are not on the lease to reside in the apartment.

Ms. Tollefson's determination that the three signers actually did reside at the addresses listed despite written evidence to the contrary was based entirely on speculation and was an abuse of her discretion. Ms. Tollefson should only make her determination based on the evidence submitted, not speculation that the evidence might be inaccurate when there is absolutely nothing in the record to support that.

A reasonable person following a demonstrably rational process that had a legitimate concern over how Ms. Jimenez determined the non-residency of the three challenged signers would have made at least some minimal attempt to consult extrinsic sources. Ms. Tollefson could have taken 5 minutes to email Ms. Jimenez, and Ms. Jimenez may or may not have responded timely, but we have no way of knowing because Ms. Tollefson made no such attempt. A reasonable person would have at least made some attempt, but Ms. Tollefson did not.

SUMMARY:

The Complainant requests that the Wisconsin Election Commission decide in favor of the Complainant and that the Respondent be required to correct her decision issued in response to the original challenge in accordance with the law.

I, John Petersen, being first duly sworn, on oath, state that I personally read the above complaint, and that the above allegations are true based on my personal knowledge and, as to those stated on information and belief, I believe them to be true.


John Petersen, Complainant


February 10th 2022
Date
10:37 am

STATE OF WISCONSIN

COUNTY OF Brock,
(county of notarization)

Sworn to before me this 10th day of February
10:39 am
_____, 2022.

JACKIE PHAM
Notary Public
State of Wisconsin

 (Jackie Pham)
(Signature of person authorized to administer oaths)

My commission expires April 12, 2025, or is permanent.

Notary Public or _____
(Official title if not notary)